OPINION NO. 1051

DISTRICT OF COLUMBIA TAX COURT

WILLIAM A. SUTHERLAND, MAC ASBILL, JOSEPH B. BRENNAN, LAURENS WILLIAMS, HERBERT R. ELSAS, RANDOLPH W. THROWER, EDWARD J. SCHMUCK, JAMES H. WILSON, Jr., MAC ASBILL, Jr., KENNETH H. LILES, WILLIAM R. PATTERSON, WILLIS B. SNELL, JAMES V. HEFFERNAN, D. ROBERT CUMMING, Jr., JAMES P. GROTON, MICHAEL J. EGAN, Jr., and GEORGE L. COHEN, T/A SUTHERLAND, ASBILL & BRENNAN,	)	FILED NOV 22 1965 District of Columbia Tax Court
Petitioners,	)	
vs.	)	DOCKET NO. 1976
DISTRICT OF COLUMBIA,	)	
Respondent.	)	

FINDINGS OF FACT AND OPINION

The assessing authority of the District of Columbia assessed the petitioners a personal property tax on wood partitions, reception counter, wooden valances, cabinets, bookshelves and work table, attached to the walls, ceilings or both in the law office rented by them. The petitioners contend that the aforesaid articles are attached firmly to the realty and belong to their landlord as a part of the office building. The respondent denies such contention and asserts that the articles are taxable tangible personal property.

Findings of Fact

1. The petitioners are partners in a partnership engaged in the practice of law; and as such occupy office space on the twelfth floor of the Farragut Building, at 900 Seventeenth Street, Northwest, Washington, D. C. which they rent from Judith Gerber, Inc., under a lease running from June 1, 1963 to May 31, 1968.

2. The lease from Judith Gerber, Inc. to the petitioners provides, among other provisions, that "All alterations, additions to, or improvements upon the demised premises, or the buildings of which they are a part, made by either party (except moveable furniture or equipment put in at the expense of the Lessee) shall immediately become the property of the Lessor and shall remain upon and be surrendered with the premises as a part thereof at the end of the term without disturbance, molestation or injury."

3.(a) The petitioners at their own cost or expense and while the building was uncompleted annexed to, or installed in the leased premises the millwork or improvements following:

a. Eight wall-like walnut wood and glass partitions between secretarial areas, running from ceiling to floor, secured to the floor, wall, and ceiling and removable only by dismantling.

b. A curved, "L"-shaped walnut reception counter, with storage space, fitted between, and fastened to, the wall and a structural column of the building.

c. Walnut floor to ceiling valances framing two walls of a conference room, secured to the floor, wall and ceiling and removable only by dismantling.

d. Built-in walnut cabinets and bookshelves in eleven separate offices fitted between and flush against walls and secured thereto by screws.

e. A walnut library work table, having legs on one side only and on the other side secured to the wall by screws and having an original cost of $265.00.

f. Wooden built-in supply shelves in a file room, between and against walls and having an original cost of $385.00.

g. Doorknobs and door catches for conference room doors, having an original cost of $55.28.

(b) The aforesaid items of millwork or improvements a, b, d, e and g are securely and permanently fixed to the leased building, and cannot be moved without material or substantial injury to the building and the millwork or improvements.

(c) The aforesaid items of millwork or improvements e and f can be moved without material or substantial damage to the leased building.

(d) All of the aforesaid items of millwork or improvements are custom built and specially designed, and would have little, if any value if ripped out or removed from their positions in the leased premises.

(e) It was the intention of the petitioners that the aforesaid items of millwork or improvements should be permanently a part of the leased premises and should belong to the landlord.

4.(a) On May 26, 1965, the assessing authority of the District of Columbia assessed the petitioner a tangible personal property tax on the millwork or improvements detailed in Finding 3(a) herein for the fiscal year ended June 30, 1965, in the amount of $190.86, plus interest in the amount of $5.73, or a total of $196.59, which the petitioners paid on June 30, 1965.

(b) The items of millwork or improvements detailed in Finding 3(a) herein, were valued or appraised for the purpose of taxation by the assessing authority of the District as follows:

	Improvements	Original Cost	Assessed Value (July 1, 1964)
a.	Wood and glass partitions between secretarial areas	$2,940.00	$2,695.00
b.	Reception counter	1,100.00	1,008.00
c.	Built-in cabinets and shelves in attorneys' offices	4,890.25	4,482.00
d.	Conference room valances	590.00	541.00
e.	Built-in supply shelves in file room	385.00	353.00
f.	Built-in library work table	265.00	243.00
	Total	$10,170.25	$9,322.00

5. This case was filed on August 16, 1965.

Opinion

The question here presented is whether certain items of millwork or improvements fixed to, or installed in premises leased by the petitioners were tangible personal property owned by them, and as such subject to taxation.

The petitioners are members of a partnership engaged in the practice of law in the District of Columbia. They entered into a lease from Judith Gerber, Inc. for all of the twelfth floor of the Farragut Building at 900 Seventeenth Street, N. W., Washington, D. C., with a term running from June 1, 1963, to May 31, 1968. The lease contained a provision reading as follows:

> "7. All alterations, additions to, or improvements upon the demised premises, or the buildings of which they are a part, made by either party (except movable furniture or equipment put in at the expense of the Lessee) shall immediately become the property of the Lessor and shall remain upon and be surrendered with the premises as a part thereof at the end of the term without disturbance, molestation or injury."

The petitioners at their own expense attached to or installed in the leased premises the millwork or improvements following:

a. Eight wall-like walnut wood and glass partitions between secretarial areas, running from ceiling to floor, secured to the floor, wall, and ceiling and removable only by dismantling.

b. A curved, "L"-shaped walnut reception counter, with storage space, fitted between, and fastened to, the wall and a structural column of the building.

c. Walnut floor to ceiling valances framing two walls of a conference room, secured to the floor, wall and ceiling and removable only by dismantling.

d. Built-in walnut cabinets and bookshelves in eleven separate offices fitted between and flush against walls and secured thereto by screws.

e. A Walnut library work table, having legs on one side only and on the other side secured to the wall by screws and having an original cost of $265.00.

f. Wooden built-in supply shelves in a file room, between and against walls and having an original cost of $385.00.

g. Doorknobs and door catches for conference room doors, having an original cost of $55.28.

The above described millwork or improvements were annexed to the leasehold premises with the intention that they would be permanent additions to the building.

The Court has found, after consideration of the evidence and an inspection of the premises in company with counsel for both the petitioners and the respondent, that items a, b, d, e and g are so fixed to the premises that they are securely and permanently attached to the building, and that they cannot be removed without substantial damage to both the building and the millwork or improvements. On the other hand the millwork or improvements c and f can be removed without substantial damage to the building, or, perhaps physically to the items. In that connection, however, it should be observed that all of the items are custom built, and designed especially for the leased premises, and if removed would be of little, if any value. This is particularly true as to the wood valances in the conference room (Item c). This is true to a somewhat less extent as to the built-in shelves in the file room, which would, however, have to be cut down or substantially demolished or damaged for removal from the premises at the end of the lease term. Moreover, their usefulness would largely be dependent upon obtaining new offices with exact, or nearly exact wall measurements.

The petitioner relies upon two cases, among others, which were decided by this Court, namely, L. E. Breuninger & Sons, Inc. v. District of Columbia, Docket No. 890 (Opinion No. 613), and Old Europe, Inc. v. District of Columbia, 88 W.L.R. 1799. The facts in those cases are slightly different from those in this case, but they announce applicable principles, namely, that the intention of the party making annexation or installation of the article that it should be a permanent part of the freehold

(Teaff v. Hewitt, 1 Ohio St. 511); and that damage to the freehold would result in removal thereof, are important factors in determining whether a particular fixture is personal property or a part of the real estate. Of the two factors the petitioner believes that "intention" is more important. There is some support for this position Shugart v. Nocona Independent School District, 288 S.W.2d 243 (Tex. Civ. App. 1958); United States v. 52.67 Acres of Land, 150 F.Supp. 347. L. E. Breuninger & Sons, Inc. v. District of Columbia, supra; Old Europe, Inc. v. District of Columbia, supra; Thompson on Real Property, Fixtures, Section 56 (1964 Replacement). In that connection, the Court has found that the petitioners intended that the aforementioned millwork or improvements should be permanently a part of the leased premises, and should belong to the landlord.

The respondent relies principally on three cases for the interpretation of Paragraph 7 of the lease, quoted above, which seems to be a stock provision in leases of the character of the one here under consideration. Those authorities are Century Holding Company v. Pathe Exchange, Inc., 200 App. Div. 62, 192 N.Y. Supp. 380; Schultz v. England, 106 F.2d 764 and United States v. Certain Property, Etc., 306 F.2d 439, wherein were involved lease provisions substantially identical with Paragraph 7 of the lease to the petitioners, except that the exclusion in the former case was "office furniture" and in the latter "furniture" as distinguished from "furniture or equipment" in the present lease. The respondent cites also McKeage v. Hanover Fire Insurance Co., 81 N.Y. 38, 37 Am. Rep. 471, which held that some mirrors kept in place by hooks and supports and others fastened with screws in woodwork, and others driven into walls, but all easily detached without injury to the leasehold did not become a part thereof, but remained personal property.

The same was held in Hartberg v. American Founders' Securities, Inc., 212 Wis. 104, 249 N.W. 48, which involved carpet strips nailed to a wooden block in a concrete floor. In Century Holding Company v. Pathe Exchange, Inc., supra, the articles involved were partitions which apparently were intended to be moved from time to time. They were not made especially for the premises involved, nor would the removal therefrom render them valueless. Moreover, the tenant upon installation did not intend that the partitions would belong to the landlord. Schultz v. England, supra, holds that equipment, all of which with the exception of one article, connected to a leased building by wires and pipes, were not a part of the leased realty, but were moveable furniture and belonged to the bankrupt tenant, but the 9th. Circuit Court of Appeals observed that the equipment could be removed without injury to the leased premises. While it is true that the Court of Appeals, 9th. Circuit, in United States v. Certain Property Etc., supra, held, as did the New York Court in the Century Holding Company case, that the term "furniture" in the exclusive phrase in the lease, was not limited to "Such 'furniture' as tables, chairs, etc.", some of the items of equipment in the buildings condemned were personal property belonging to tenants. The articles held to be furniture were different from those here involved, in respect of their purpose and the intention of the tenants. The same is true in respect of the articles of property in McKeage v. Hanover Fire Insurance Co., supra; and in Hartberg v. American Founders' Securities, Inc., supra.

The Court believes that in respect of all of the items of millwork or improvements here involved the facts are similar to those recited in that portion of the opinion in United States v. Certain Property, Etc., supra, which reads as follows (Page 446):

"Taking first the Government's appeal and looking to the law of New York to determine what constitutes 'real' property, as we must, we think it plain that the Government 'took' the bulk of the items for which Judge Knox made an allowance, although his opinion does not indicate any detailed consideration of the New York authorities. New York entertains a rather broad view of what improvements are regarded as realty. In Jackson v. State, 213 N.Y. 34, 106 N.E. 758, L.R.A. 1915D, 492 (1914), the Court of Appeals held that a taking of real estate included 'machinery, shafting, elevators and conveyors.' Machinery is deemed real property 'where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature.' Matter of City of New York (Whitlock Avenue), 278 N.Y. 276, 281-282, 16 N.E.2d 281, 282 (1938). The New York courts also regard as real estate those improvements which 'were used for business purposes and would lose substantially all of * * * / their / value after severance,' although their removal does not damage the rest of the realty. Matter of City of New York (Seward Park Slum Clearance Project), 10 A.D.2d 498, 500, 200 N.Y.S.2d 802, 804 (1st Dept. 1960). Such improvements would include 'custom built or specially designed fixtures / which / have little or no "market value" when ripped out and removed,' Marraro v. State, 15 A.D.2d 707, 223 N.Y.S.2d 556 (3d Dept. 1962). Il Progresso's printing machinery fit these descriptions."

The petitioners' concession or statement that they intended the above described articles to become a part of the leased premises is a declaration against interest, in that they are foreclosed thereby from the removal thereof when their term shall expire. The articles are expensive and custom made, and it is unlikely that they would concede that they belong to the landlord unless they intended that such would be the case, and that, if removed they would be practically useless.

For the reasons stated the Court is of the opinion that the above described millwork and improvements are a part of the realty, and as such belong to the landlord. The Court therefore holds that a personal property tax for the fiscal year ended June 30, 1965, in the amount of $190.86, plus a penalty of $5.73, or a total of $196.59, was erroneously assessed

against, and collected from the petitioners; and that the petitioners are entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from June 30, 1965, to the date of the payment of the refund.

Decision will be entered for Petitioners.

Jo. V. Morgan
Judge

DISTRICT OF COLUMBIA TAX COURT

WILLIAM A. SUTHERLAND, MAC ASBILL, JOSEPH B. BRENNAN, LAURENS WILLIAMS, HERBERT R. ELSAS, RANDOLPH W. THROWER, EDWARD J. SCHMUCK, JAMES H. WILSON, Jr., MAC ASBILL, Jr., KENNETH H. LILES, WILLIAM R. PATTERSON, WILLIS B. SNELL, JAMES V. HEFFERNAN, D. ROBERT CUMMING, Jr., JAMES P. GROTON, MICHAEL J. EGAN, Jr., and GEORGE L. COHEN, T/A SUTHERLAND, ASBILL & BRENNAN,	)	FILED NOV 22 1965 District of Columbia Tax Court
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Respondent.	)	

D E C I S I O N

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is, by the Court this 22nd. day of November, 1965,

ADJUDGED AND DETERMINED, That a personal property tax for the fiscal year ended June 30, 1965, in the amount of $190.86, plus a penalty of $5.73, or a total of $196.59, was erroneously assessed against, and collected from the petitioners; and that the petitioners are entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from June 30, 1965, to the date of the payment of the refund.

Jo. V. Morgan
Judge

Findings of Fact, Opinion and Decision
Served as follows:

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